82035-0

Court of Appeals Cause No. 266141

IN THE COURT OF APPEALS

OF FOR THE STATE OF WASHINGTON

JANET CARLISLE, ROBERT ARMSTRONG, KENT BELL, KELLY BRAZIL, DAWN BRACKENSICK, STEVEN BRACKENSICK, JOHAN CURTISS, MICHAEL CURTISS, GARY FORD, MELINDA FORD, WILLIAM GABEL, ALFRED GARCIA, CLIFFORD HAMPTON, ERIKA HARLOW, BILL HUEBNER, EUGENE JUTEAU, CONNIE KRULL, COLLEEN MILLER, KENNETH MILLER, STEVEN MYRICK, HEIDI NEWSOME, TODD NEWSOME, CRAIG NIGHSWONGER, MICHAEL PRATHER, JOSEPH PRAINO, MARK REPKO, LAURA SPRINGER, LINDSAY WAGNER, TYLER WAGNER, ALLISON WALSH, TOM WALSH, DANIEL WANDLER, SHELLY WANDLER, RICHARD ZELMER,

Appellants,

vs.

COLUMBIA IRRIGATION DISTRICT, a municipal corporation

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

The Appellants are a group of homeowners who reside in West Richland, Washington. Respondent, the Columbia Irrigation District ("CID"), is an irrigation district organized under Chapter 87.03 RCW. The CID initiated a process to expand the borders of its jurisdiction to include the Appellants' property. This procedure is called the add-lands process. To properly expand the boundary of an irrigation district, a district must obtain petitions from holders of title of one-half or more of the land to be added. The first component of this appeal (a) challenges the procedures employed by the CID to add lands to its jurisdiction and (b) disputes that the CID attained the minimum requisite number of petitions.

After completing what the CID believed to be a proper expansion of its boundaries, the CID then initiated the process to finance the extension of its irrigation infrastructure throughout the Appellants' property. To pay for the costs of installation of the infrastructure, the CID formed a local improvement district ("LID"). Once the LID is formed, property owners are assessed to pay for their pro-rata share of the infrastructure.

The second component of this lawsuit challenges the statute and methods employed to form the LID. Specifically, the CID's notice of the hearing where the vote to form the LID was to take place stated a "poll"

would be taken rather than a binding vote. Additionally, RCW 87.03.485 requires those in opposition to LID formation to file a written protest at or before the hearing or consent to the LID formation will be implied. In this instance 148 voted against and 51 in favor of formation LID. However the non-votes totaled 601 and the vote passed. This statute violates the constitutional requirement that all elections be free and equal.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in finding that adequate procedural due process safeguards were employed during the add-lands process.

2. The trial court erred in finding that the CID's change in deadlines, acceptance of petitions from business that did not provide required documentation, counting of invalid petitions, and misleading notice did not violate the due process rights of the Appellants.

3. The trial court erred in finding that the voting procedures set forth in RCW 87.03.485 comply with Article 1 § 19 of the Washington State Constitution.

4. The trial court erred in finding that the notice of hearing issued by the CID to form the LID was reasonably calculated to apprise the Appellants that a vote would occur that would impose a mandatory assessment on their property in violation of their due process rights.

Issues Pertaining to the Assignments of Error

1. As applied to the acts of the CID in adding the Appellants' property to its jurisdiction, did the lack of procedural safeguards in RCW 87.03.560 lead to the violation of the due process rights of the Appellants and require invalidation? (Assignment of Error 1).

2. Were the Appellants' procedural due process rights violated when the CID extended an announced deadline for the receipt of add lands petitions without notice? (Assignment of Error 2).

3. Were the Appellants' procedural due process rights violated when the CID requested but failed to obtain LLC Certificates, Certificates of Formation, LLC Membership Agreement, and a List of LLC Members for purposes of validating the petitions provided by Swanson-Parsons LCC and AM Properties? (Assignment of Error 2).

4. Even though the CID received Swanson-Parsons LLC information after Appellants were added to the district and formed the LID, did an additional due process violation occur when the CID obtained this information and made a de facto determination it was sufficient even though member Sonny Parsons disputed the authority of his partner, Dan Swanson, to sign the petitions without Parsons' knowledge or approval? (Assignment of Error 2).

5. Even though the CID received the AM Properties corporate information after the Appellants were added to the district, did an additional due process violation occur when the CID obtained this information and made a de facto determination it was sufficient even though it had learned that AM Properties was administratively dissolved at the time the petitions were signed? (Assignment of Error 2).

6. Were the Appellants' procedural due process rights violated when Respondent counted add lands petitions signed by property owners who no longer held title to the property for which the petition was signed? (Assignment of Error 2).

7. Did the CID fail to comply with the notice requirements set forth in RCW 87.03.565 and RCW 87.03.200 in violation of the Appellants' due process rights when it told the residents in a public meeting the add lands hearing would be December 5, 2006 but but held the hearing on March 6, 2007 and only provided notice by publication? (Assignment of Error 2).

8. Does RCW 87.03.485 violate Article 1 § 19 of the Washington Constitution by providing for an elective process where a written protest is required to be filed before or at a hearing to form a local improvement district, otherwise, the consent to the formation of the district is implied? (Assignment of Error 3).

9. Did the CID violate the procedural Due Process rights of the Appellants when it sent out notices that advised the residents that "a question and answer session will be held, followed by a poll of those in attendance to determine if an LID should be formed" when in reality a final binding vote took place? (Assignment of Error 4).

III. STATEMENT OF THE CASE.

A. Add Lands Process.

The CID is an irrigation district, formed under Chapter 87.03, RCW. The Appellants are a group of homeowners who live in West Richland, Washington. The events giving rise to this appeal began in 2006 after the CID initiated the process to expand its service area to include the Appellants' property. That new service area and the subject of this lawsuit has been called the Belmont District.

To initiate the procedures to add the Belmont resident's property to the CID's service area, the CID mailed to the Belmont District residents a "Notice of Public Meeting" for a meeting held on September 19, 2006 at William Wiley Elementary School. (CP 00039). Over 100 people attended. (CP 00177). At that meeting, the CID discussed the project and provided a power point presentation. A hardcopy of the power point presentation was provided. (CP 00042). That document provided the following time line:

- Petitions by one-half or more of the body of land to be added to the District, . . . must be filed by October 27th
- Petitions will be submitted to the Board at their regular meeting on November 7th
- If approved, the hearing will be scheduled for December 5th.

Despite the notice and power point referenced above, the CID counted 12 petitions totaling 3.14 acres signed by Dennis Murphy of Hayden Enterprises on November 6, 2006 and received on the date of the November 7, 2006 Board meeting. (CP 00160-172). The CID extended this date without any official action by the Board and without notice to the public. (CP 00088). More important, of these Petitions signed November 6, 2006 by Dennis Murphy, six of the lots totaling 1.57 acres had already been sold between the months of July 25, 2006 and September 26, 2006 underscoring the importance of a validation process. (CP 00054).

Similarly, on September 12, 2006, seven Petitions to Add Lands were signed by Gregory S. and Carla A. Markel for property that was sold before the November 7, 2006 hearing held by the CID. (CP 00057-68). These seven petitions total 1.83 acres.

The Respondent readily admits that other than RCW 87.03 sections that govern the adding of lands, it has no policies or procedures that are followed during the add lands process. (CP 00090 & 132-33). To begin the

process of adding lands, the CID's staff logs on to the County Assessor website to determine the owner of each property targeted for inclusion in the expanded area. (CP 00134-35). Once signed petitions were returned to the CID, no further verification occured. (CP 00135).

CID Secretary, Larry Fox testified that he and the CID Board were ultimately responsible to make a determination if the petitions were valid. (CP 00091). However, the CID staff and attorney, did not make the CID Board and the any of the Belmont residents aware of any questions about the validity of any petitions. (CP 00091).

In addition to the receipt of petitions that were faulty and never verified, the CID accepted several petitions from property developers who held several acres. The CID asked each development company to provide an LLC Certificate, which attaches a true and correct copy of the Certificate Formation, a true and correct copy of the LLC Membership Agreement and a Certificate that the LLC has provided a complete list of its members of the LLC. (CP 00138).

An example of a properly completed packet submitted by developer Roger W. McKinnon, a member of Ala Moana Way Property, LLC was introduced at summary judgment to demonstrate a properly submitted package. (CP 00094-118). These documents were sent with the Petition to Add Lands so that the CID could presumably verify proper

corporate authorization for signing the Petition to Add Lands. (CP 00094-97).

In the case of Swanson-Parsons LLC, Robin Brown, an employee of the Respondent, sent a letter to Daniel Swanson dated October 18, 2006 requesting the three items with the LLC certificate. (CP 00136). This letter was sent because the petitions were not correct. (CP 00137). When these were not received, Brown sent a second letter dated October 31, 2006 to Swanson stating the CID had not received the "LLC Resolution or the required documents." (CP 00138-39). This was sent even though the deadline for receipt of petitions had passed. (CP 00139).

Prior to these letters Brown had sent an e-mail dated September 8, 2006 to a West Richland employee by the name of Ilka Gilliam providing the Petitions, LLC form and corporate resolution form to be signed by the appropriate Swanson-Parsons LLC representative. (CP 00143-44). When those corporate forms were not executed nor provided by the November 7, 2006 hearing, the CID tried to cover their tracks on November 15, 2006 when Ms. Brown sent a follow-up e-mail to Ilka Gilliam which stated in part:

> Swanson should know what is needed because we sent a request for these documents directly to him earlier. I have attached a copy of the LLC Certificate that needs to be signed and notarized. He is also required to send a copy of

> the LLC's Certificate of Formation agreement, LLC's Membership Agreement and a list of members of the LLC.
>
> Hopefully, we can get these documents sooner rather than later. We really need these to validate the Petition.
>
> (CP 00148-52).

These documents were never provided, yet the petitions signed by Dan Swanson were counted by the CID. Appellants subsequently learned through Sonny Parsons, a 50% partner of Swanson-Parsons, that he was never contacted about signing these petitions and that a vote of more than fifty percent of the ownership interest is required to take action under the LLC Agreement. (CP 00172-73). Not only was there no vote by the LLC members, Dan Swanson did not even discuss signing these documents with Parsons nor present the documents to him for review. (CP 00173).

Swanson-Parsons, LLC was organized to do the following:

> (a) To own, develop, lease advantaged real estate;
>
> (b) To carry on any lawful business or activity which may be conducted by a limited liability company organized under the acts; and
>
> (c) To exercise all other powers necessary or reasonably connected with the company business which may be legally exercised by limited liability company under the act.

Swanson-Parsons, LLC Articles of Incorporation made clear that, as a fifty percent partner, Dan Swanson was required to notify Sonny

Parsons of his intent to sign the Petition to Add Lands. Article 3.2 of the Swanson-Parsons LLC Agreement provides:

> **Authority of Members.** Votes shall be counted according to the percentage of ownership interest. The vote of more than 50% of the ownership interests shall be the act of the members, unless the vote of a greater or lesser percentage is required by this Agreement or the Act. . .

Article 6.6 provides:

> **Manner of Acting**. If a quorum is present at a meeting, the affirmative vote of members holding more than fifty percent of the ownership interest represented at that meeting in person or by proxy shall be the act of the members, unless the vote of greater or lesser percentage is required by this agreement or act.

Article 6.8 provides:

> **Action by Members Without a Meeting**. Any action required or permitted to be taken at a meeting of members may be taken without a meeting if the action is evidenced by one or more written consents describing the action taken, executed by members entitled to vote thereon and delivered to the principal office of the company for inclusion in the company's records. Action taken under this section is effective when all members entitled to vote thereon has signed such consents, unless the consents specify a different effective date.

(CP 00191-92).

The Swanson-Parsons LLC documents were never received yet these petitions were validated in a de facto manner because the CID decided to count these petitions irrespective of having the documentation. (CP 00095 & 00141). The Swanson-Parsons petitions total 26.95 acres

that should not have been counted for purposes of obtaining 50% of the necessary petitions to properly add lands to the CID's jurisdiction.

Similar to the Swanson-Parsons, there was no documentation for a second business, AM Properties. An effort to obtain this information is documented in a letter dated October 19, 2006 to AM Properties. It states:

> The LLC documents were not submitted with the Petition. We cannot process your Petition until you submit the LLC Certificate, along with the copy of the LLC Certificate of Formation, the LLC's Membership of Agreement and the list of the LLC members.
>
> We would appreciate your prompt attention to this matter. The deadline to submit the Petition is October 26, 2006. Should you have any questions, please feel free to contact our office at 586-6118.
>
> (CP, 00153).

Like Swanson-Parsons, LLC no corporate verification for AM Properties was attained. (CP 95, 154-55). The red flag over the AM Properties is documented in Robin Brown's letter to AM Properties dated October 19, 2006. Which clearly states CID "can not process your petition" until this information was provided. (CP 153). Despite this lack of information, the petitions were counted. Once these deficiencies were brought to light, CID Secretary, Larry Fox, explained this information is only something "we like to have to go along with the petitions" implying these were not required. (CP 00123-24).

The importance of having this information is underscored by the fact that when Mohinder Sohal signed the AM Properties Petition to Add Lands on October 13, 2006, AM Properties had been administratively dissolved for over one year. AM Properties was dissolved on November 1, 2005 and did not apply for reinstatement until October 17, 2006, after the Petitions were signed. (CP 00022 & 00267). Despite these issues, the AM Properties petitions were counted totaling 32 acres.

As set forth above, CID advised the Belmont residents that the hearing to add lands would be December 5, 2006. No hearing occurred on this date. (CP 00036). Rather, the hearing was held three months later on March 6, 2007. (CP 00011). The record is clear that the residents of the Belmont District were actively engaged in the add lands proceedings and had signed in at the September 19th meeting (CP 00037) but no one attended the hearing because they did not know about the meeting. (CP 00036-37). The Appellants had also been led to believe that the hearing would be in December. Despite these many issues and lack of validation process, the CID adopted Resolution 2007-01 which states, among other things that the "CID staff and counsel have at the Board of Director's direction, examined the Petitions and determined their sufficiency". (CP 00298).

B. LID Formation.

After the CID added the Appellants' property to its district, it then engaged in the process of forming an LID. The CID sent out a series of letters dated April 27, 2007 (CP 00073-74 & 00127-31). The letter provides in relevant part:

> The hearing will be held at William Wiley Elementary School . . . on **Thursday, May 10, 2007 from 7:00 p.m. – 8:30 p.m.** A question and answer session will be held, *followed by a poll* of those in attendance to determine if an LID should be formed. If you are unable to attend, indicate your preference in writing and submit it to the District at the above address no later than May 10, 2007. Below is a copy of the formal notification for public hearing.

There is no statutory requirement to take a "poll" of residents to determine if an LID should be formed. RCW 87.03.485 provides the procedures for notice of a hearing and for how the vote shall be conducted. RCW 87.03.485 provides in relevant part:

> As an alternative plan and subject to all of the provisions of this chapter, the board of directors may initiate the organization of a local improvement district as herein provided. To so organize a local improvement district the Board shall adopt and record its minutes a resolution specifying the lands proposed to be included in such local improvement district or by describing the exterior boundaries . . . said resolutions shall state generally the plan, character and extent of the improvements, that the lands proposed to be included in such improvement district will be assessed for such improvements; and that local improvement district bonds of the district will be issued or a contract entered into . . . to meet the costs thereof . . . said resolutions shall fix a time and place of hearing thereon and

> shall state that unless a majority of the holders of title or of evidence of title to lands within the proposed local improvement district file written protest at or before said hearing, consent to the improvement will be implied. . . .

RCW 87.03.485 (1983). At the May 10, 2007 hearing, a poll was not taken. Rather an election was held. After counting those who attended the vote was broken down as follows: 148 No votes, 51 Yes votes, and 601 Non-votes. Applying the statute, the CID determined that the vote was 652 in favor to 148 opposed. (CP 00076-78).

IV. ARGUMENT

Appellants request the invalidation of the add lands process that annexed their property into the CID's jurisdiction and invalidation of the LID formed by CID. The record demonstrates that notices were deficient, errors were made, and in some circumstances, key decisions were made by the CID staff that was not disclosed to the CID Board and the Belmont residents. These failures violated the Due Process clause of the Washington Constitution.

1. STANDARD OF REVIEW.

Summary judgment is proper only when the pleadings, affidavits, and depositions on file demonstrate that there is no issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and reasonable inferences are considered in a light most

favorable to the nonmoving party. *Rhoades v. City of Battleground*, 115 Wn.App. 752, 758, 63 P.3d 142 (2002). All questions of law are reviewed de novo. *Id.* Constitutional challenges are reviewed de novo. *State v. Nelson,* 158 Wn.2d 699, 702, 147 P.3 533 (2006).

2. THE ADD LANDS STATUTE LACKS PROCEDURAL SAFEGUARDS.

"No person shall be deprived of life, liberty, or property, without due process of law." Washington Constitution, Article 1 § 3 (1889). A statute may be challenged on its face or as applied to the facts of a particular case. In order to make a facial challenge of a statute, the challenging party must show that there is no set of circumstances in which the statute, as written, can be constitutionally applied. *State v. Clinkenbeard*, 130 Wn.App. 552, 561, 123 P.3d 872 (2005). An as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that the application of a statute in the specific context of the party's actions is unconstitutional. *Id.* at 561.

Due process is a flexible concept; the exact contours are determined by the particular situation. *Rhoades*, 115 Wn.App. at 765. Procedural due process restrains governmental decision-making that deprives individuals of liberty or property interest within the meaning of the due process clause. *Id.* An essential principle of procedural due

process requires an opportunity to be heard at a meaningful time and in a meaningful manner. *Id.* at 115 (quoting *Matthews v. Eldridge*, 424 U.S. 319, 332, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

Determining what process is due in a given situation requires consideration of the following: (1) the private interest that would be effected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and, the probable value, if any, of additional or substitute procedural safeguards; (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural safeguards would entail. *Tellevik v. Real Property Known as 31641 West Rutherford Street*, 120 Wn.2d 68, 78, 838 P.2d 111 (1992).

There are two distinct categories of Due Process violations in this case. First, the governing statute is void of any validation process and Respondent has none of its own. The lack of controls and validation created a framework that led to an erroneous deprivation of Appellants' property rights in the form of assessments on their property. Second, the lack of controls led to un-refuted errors in the counting of petitions, taking action that affected the outcome without notice, and providing unclear information about hearing dates. Any one of these errors could be deemed to violate the Appellants' Due Process rights. The cumulative effect

demonstrates a volume of errors and mistakes that approaches a worst case scenario performance by a governmental entity that demands invalidation.

A. RCW 87.03.560 Provides no Oversight for the Detection and Prevention of Errors.

A fundamental defect of RCW 87.03.560 is that it is void of any validation process. The lack of a validation process led to procedural errors and abuses which, in this context, are in violation of the due process clause. RCW 87.03.560 provides, in relevant part:

> The holder or holders of title, or evidence of title, representing one-half or more of any body of lands filed with the board of directors of an irrigation district a petition in writing, praying that the boundaries of the district may be so changed so as to include such lands. The petition shall describe the boundaries of the parcel or tract of land, and shall also describe the boundaries of the several parcels owned by the petitioners, if the petitioners be the owners respectively of distinct parcels, such descriptions need not be more particular than they are required to be when such lands are entered by the county assessor in the assessment book. Such petition must contain the consent of the petitioners to be an inclusion within the district of the parcel or tracts of land described in the petition, and of which the petition alleges they are respectively the owners; and it must be acknowledged in the same manner that conveyances of land are required to be acknowledged.

RCW 87.03.560 (2001).

Appellants do not dispute the statute can conceivably be applied without violating the Due Process clause. In this case, when the three-part

test is applied it becomes evident that the CID capitalized on the lack of safeguards to gain the requisite number of petitions.

i. The interest at stake is the imposition of the CID's assessment.

In this case, the private interest at stake is obvious. The Appellants are subjected to a procedure whereby an unavoidable assessment will be applied to their property. Lands within an irrigation district are subject to and remain liable for the payment of its obligations. *State ex rel. Wells (Sunnyside Valley Irr. Dist.) v. Hartung*, 150 Wash. 590, 599, 274 P.181 (1929).

ii. The risk of erroneous deprivation is obvious and safeguards exist that would prevent these errors.

Numerous petitions utilized by the CID have some form of deficiency. With no validation procedure there is no mechanism to even identify deficient petitions. At a minimum, this allows for sloppy procedures which result in unavoidable assessments against property. At worst, the lack of a validation process promotes abuse.

Safeguards are readily available that would prevent erroneous deprivation. For example, cities can annex property through the petition method which is very similar to the add lands process. Safeguards have been imposed for the petition method. These include: (1) transmitting petitions to the county auditor or assessor who review and issue a

determination of sufficiency; (2) a "terminal date" is set after which no additional petitions may be added; (3) signed petitions for property owners are compared to county auditor records to determine if the signer of the petition is the owner of record; and (4) for an officer of a corporation signing a petition, the corporation shall attach to the petition a certified excerpt of the bylaws of such corporation showing authority to sign. RCW 35A.01.040(4) and (9) (2003).

Unlike cities who add property to their jurisdictions, irrigation districts are authorized to add lands to their district without any verification process. In this case, no procedural safeguards similar to those in RCW 35A.01.040 existed and the CID took not steps to verify the accuracy of their work despite the representations it made in Resolution 2007-01. These safeguards (1) would have prevented the CID's arbitrary decision made without notice to accept petitions after October 27, 2006; (2) excluded the invalid petitions for property already sold; and (3) excluded insufficient petitions signed by LLC members that failed to provide documentation of corporate authority.

The record in this case shows there is a high risk of erroneous depravation without these safeguards and additional safeguards exist and could be easily utilized.

iii. There would be little fiscal or administrative burden by requiring procedural safeguards.

The government should have a heightened interest in preventing citizens from being subjected to error ridden procedures that ultimately result in the imposition of irrigation district charges and LID assessments. A blue print exists to provide safeguards against abuse and errors like those committed by CID. The legislature could simply require irrigation districts to follow the same procedures utilized by municipalities by requiring petitions be reviewed by the county assessor or the county auditor for determination of sufficiency. As it stands now, RCW 87.03 contains no validation process. The State has provided for a validation process in other contexts. Fiscal and administrative burdens that the additional or substitute procedural safeguards would entail are readily ascertainable through examining the procedures set forth in RCW 35A.01.040. Further, nothing prevents irrigation districts from paying for these procedures through building these costs into its rate structure. The procedures merely need to be implemented.

3. THE LACK OF PROCEDURAL SAFEGUARDS LED TO NUMEROUS ERRORS THAT REQUIRE INVALIDATION.

Numerous errors and irregularities took place during the add lands process that ultimately led to the inclusion of the Belmont District into the CID's jurisdiction and the formation of LID. Many of these are

undisputed. Nonetheless, the CID stated in Resolution 2007-01 that the petitions had been examined and CID staff and counsel had "determined their sufficiency". The evidence shows that nothing was done to determine petition sufficiency.

A. Respondent Extended the Deadline for Receipt of Petitions Without Notice.

The CID initially provided a date of October 27, 2006 for the submittal of Add Lands Petitions. The CID Secretary and legal counsel decided, without disclosure to the CID Board or the Appellants, to accept and count petitions received well after that date. This was done so that the CID could ensure it met the fifty percent threshold required to add lands to their district.

CID defended this act by stating that no deadline exits. However, the lack of disclosure deprived the Appellants of an opportunity to challenge the late petitions. A terminal date provides predictability and fairness. In this case, this undisclosed extension allowed the twelve (12) Hayden Enterprises petitions totaling 3.14 acres to be added after the deadline.

B. Corporation and LLC Petitions Were Erroneously Validated.

One limited liability company and one corporation submitted Add Lands Petitions without the LLC Certificate of Formation, without the

LLC's Membership Agreement and without the complete list of members of the LLC. These were not obtained despite specific requests made by the CID.

i. The Swanson-Parsons, LLC Petitions are Invalid.

The CID cites RCW 25.15.150(1) for the proposition that a petition signed by a member is valid. However, the CID misconstrues the ability of a partner to bind a partnership. The authority of a partnership member to bind the partnership must be harmonized with RCW 25.05.100:

> (1) Each partner is an agent of the partnership for the purpose of its business. An act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on the ordinary course of the partnership business or business of the kind carried on by the partnership binds the partnership, *unless the partner had no authority to act for the partnership in a particular matter and the person with whom the partner was dealing knew or had received a notification that the partner lacked authority*;
>
> (2) An Act of a partner which is not apparent for carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership *only if the act was authorized by the other partners*.
>
> RCW 25.05.100 (1998) (emphasis added).

Dan Swanson lacked authority to act on behalf of Swanson-Parsons LLC. The CID sent two letters and two emails requesting verification of Dan Swanson's authority. The failure to obtain that

authority signaled a problem. Upon review of the affidavit of Sonny Parsons it is clear there was a problem with Dan Swanson's authority to sign the Swanson-Parsons LLC Petition to Add Lands. The CID essentially argues that by putting its head in the sand it is absolved of any wrongdoing. Likewise, the CID's suggestion that it was merely preferable to have this information is contrary to the express representations that is was required to validate the petitions as stated in the email from Robin Brown to Ilka Gilliam at the City of West Richland.

Had the CID obtained the Swanson-Parsons LLC Articles of Incorporation, they would have had specific knowledge that Dan Swanson was not authorized to sign the Petition to Add Lands. In a conclusory statement, the CID stated in its reply summary judgment motion that the Swanson-Parsons, LLC petitions are valid because Dan Swanson, as a member, was authorized to sign the petition and did so. By acting without the knowledge of Sonny Parsons, without clear corporate authority, the Swanson-Parsons' petitions are defective. The Swanson-Parsons' Articles of Incorporation required Sonny Parson's knowledge and consent.

In resolving this issue, the Court cannot ignore the fact that the CID requested corporate authorization from Swanson-Parsons. The CID stated this information was necessary to validate the petitions. The authorization was not obtained yet the CID validated the Swanson-Parsons

petitions. These petitions should have been invalided for lack of having proper documentation. However, a second basis exists to invalidate these petitions because the requisite corporate approval did not exist. It was error for the trial court to count the Swanson-Parsons, LLC petitions. Invalidating these defective petitions would have reduced the total acreage by 26.95 acres.

ii. The AM Properties Petitions are Invalid.

The importance of a validation process is also underscored by the fact that AM Properties had been administratively dissolved for over one year when the petitions were executed. AM Properties was dissolved on November 1, 2005 and did not apply for reinstatement until October 17, 2006, after the petitions were signed and counted.

No corporate verification was obtained by the CID despite its letter to AM Properties which expressly stated it "can not process your petition until you submit the LLC Certificate along with a copy of the LLC Certificate of Formation, the LLC's Membership Agreement and the list of LLC Members." Again, in this context, due process requires a procedure that addresses these deficiencies. The procedures employed by the CID are merely ones of convenience. Its acts make clear that if it is not to the CID's advantage, procedures are disregarded. This flies in the

face of due process and requires reversal. The AM Properties petitions total 32 acres that should not have been counted.

C. Petitions were Signed and Counted for Property Already Sold.

The CID accepted petitions from Hayden Enterprises and Gregory and Carla Markel for property in which they no longer held title. No procedure existed to verify that the holder of title was signing the Petitions. The CID implies there is no error because there were not enough of these petitions to change the outcome of the decision. However, this position does not address the procedural defect and the impact it has on the Appellants' due process rights.

D. The CID's Notice for Adding Lands was Defective.

As set forth in RCW 87.03.565, the notice for adding lands shall comply with the notice requirements of special elections for the issue of bonds. That notice process is set forth in RCW 87.03.200 which requires notice by publication "once a week for at least two weeks (three times)." RCW 87.03.200 (2003). While the CID technically complied with the notice statute, it was insufficient because the CID had represented that the hearing to add lands would be held December 5, 2006.

No one showed up for the hearing to add lands on March 6, 2007. The simple reason is that the Belmont residents were told the hearing

would be held December 5, 2006. The Supreme Court has held that prior to an action which will have a direct and adverse impact on an interest in life, liberty, or property protected by the Due Process Clause, a state must provide "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Wenatchee Reclamation District v. Mustell*, 102 Wn.2d 721, 725, 684 P.2d 1275 (1984). One who challenges the constitutionality of a governmental action must show that he or she was prejudiced by the action complained of. *Id.* at 727. Notice is reasonably calculated if "the means employed are such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. *State v. Nelson*, 158 Wn.2d at 703.

The fact that no one showed up to the March 6, 2007 meeting after having over one hundred people turn out for the September 2006 meeting underscores the notice was not reasonably calculated to notify the Appellants of the meeting. There are two reasons for the lack of attendance. First, the residents believed the hearing would be held in December of 2006 as provided in the CID's power point presentation. Second, notice by publication alone was not reasonably calculated to apprise the interested parties in light of the expected timeline provided by the CID at the September meeting.

E. The Number of Valid Petitions Does Not Meet the 50% Minimum.

The Belmont District comprises 429.57 acres of property. Thus, a minimum of 214.76 acres were needed to add lands. The CID reported having sufficient petitions for 276.30 acres which, in their mind, easily exceeded the 50% threshold.

The twelve petitiond signed by Dennis Murphy of Hayden Enterprises on November 6, 2006 should be excluded. These petitions total 3.14 acres. Of these, six (6) petitions, totaling 1.57 acres were not even owned by Hayden Enterprises. Without question, these should be omitted as should the seven petitions signed by Gregory and Carla Markel for property already sold totaling 1.83 acres.

The Swanson-Parsons petitions, the AM Property petitions, the Hayden petitions where the property was already sold, and the Markel petitions represent 62.35 acres. Subtracting this from the CID's reported acreage of 276.30 is 213.95. If the court were to exclude all of Hayden petitions because they were received after the October 27, 2006 cutoff, a total of 63.92 acres would be subtracted for net total acreage of 212.38. In either event, 214.79 acres is needed to obtain the more than half the property in the Belmont District.

4. RCW 87.03.485 VIOLATES ARTICLE 1 § 19 OF THE WASHINGTON STATE CONSTITUTION.

RCW 87.03.485 requires that "unless a majority of the holders of title or evidence of title . . . file their written protest at or before the hearing, consent to the improvement will be implied." Interestingly enough, the statute does not say what discretion an irrigation board has if a majority of people did, in fact, protest. The implication is that the LID would not be formed. Otherwise, the procedure would be rendered meaningless.

The Washington State Constitution provides safeguards to protect against one-sided election procedures:

> All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Wash. Const. Art. 1 § 19 (1989). The Washington Constitution goes further to safeguard this right than does the federal constitution. *Foster v. Sunnyside Valley Irrigation District*, 102 Wn.2d 395, 404, 687 P.2d 841 (1984). Furthermore, equal protection requires that votes of citizens be equal in weight. *Postema v. Snohomish County*, 83 Wn.App. 574, 581, 992 P.2d 176 (1996), review denied, 131 Wn.2d 1019 (1997). Here, the votes were not equal. The non-vote carried the day.

The CID suggests this vote is only advisory and that the CID Board ultimately had the authority to exercise its discretion. However, in engaging in the electoral process, the CID cannot now hide behind the mantra that they merely followed the statute. When the state has chosen to submit an issue to a vote, the election must be free and equal. *Grant County Fire Protection District No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 218, 42 P.3d 394 (2002).

Challenges of LID proceedings are governed by statute. *Tiffany Family Trust Corporation v. City of Kent*, 119 Wn.App. 262, 268, 77 P.3d 354 (2003). If the property owner fails to appeal a LID assessment in the manner prescribed by statute, the owner can attack the assessment collaterally only if there is a jurisdictional defect in the LID proceedings. *Id.* at 269. A property owner may assert a jurisdictional defect *where there is a violation of constitutional right in the assessment proceedings such as lack of notice*; . . . *Id.* at 269, 270 (emphasis added). Violation of the Due Process right to notice is an example of a jurisdictional defect permitting a collateral attack. *Id.*

In determining the specific procedures required by Due Process under any given set of circumstances, the court must consider:

> The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was

> followed, the protection implicit in the office of the functionary whose conduct is being challenged, and the balance of hurt complained of and good accomplished.

In re the matter of Deming, 108 Wn.2d 82, 97, 98, 736 P.2d 639 (1987).

Of those that actually voted, the opposition was almost three to one (148 against to 51 in favor). The CID repeatedly cites to the findings that the "vote" was 651 to 148 in defending its decision to form the LID. Once the CID engaged in the elective process, the process had to be free and equal. RCW 87.03.485 cannot be construed in a manner that is free and equal.

5. RESPONDENT'S NOTICE OF HEARING TO FORM THE LID WAS DEFICIENT.

The CID sent out a series of letters dated April 27, 2007. (CP 00127-00131). The letters provided, in relevant part:

> The hearing will be held at William Wiley Elementary School . . . on **Thursday, May 10, 2007 from 7:00 p.m. – 8:30 p.m.** A question and answer session will be held, *followed by a poll* of those in attendance to determine if an LID should be formed. If you are unable to attend, indicate your preference in writing and submit it to the District at the above address no later than May 10, 2007. Below is a copy of the formal notification for public hearing.

There is no statutory requirement to take a "poll" of residents to determine if an LID should be formed. RCW 87.03.485 provides the procedures for notice of a hearing and for how the vote shall be conducted. RCW 87.03.485 provides, in relevant part:

> As an alternative plan and subject to all of the provisions of this chapter, the board of directors may initiate the organization of a local improvement district as herein provided. To so organize a local improvement district the board shall adopt and record its minutes a resolution specifying the lands proposed to be included in such local improvement district or by describing the exterior boundaries . . . said resolutions shall state generally the plan, character and extent of the improvements, that the lands proposed to be included in such improvement district will be assessed for such improvements; and that local improvement district bonds of the district will be issued or a contract entered into . . . to meet the costs thereof . . . said resolutions shall fix a time and place of hearing thereon and shall state that unless a majority of the holders of title or of evidence of title to lands within the proposed local improvement district file written protest at or before said hearing, consent to the improvement will be implied. . . .

RCW 87.03.485 (1983). At the May 10, 2007 hearing, no "poll" was taken. Rather an election was held.

As previously stated, under the Due Process clause, notice must be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Wenatchee Reclamation*, 102 Wn.2d at 724. In *Wenatchee Reclamation*, the court held that notice by publication or posting was not sufficient under the Due Process clause to inform a property owner of an upcoming special assessment foreclosure. *Id.* at 724.

There was no reason to state in a notice to the Belmont District residents that a "poll" would be taken at the May 10, 2007 meeting. Whether done out of bad judgment or with intention to deceive or influence a poor turn-out, it was deceptive rather than calculated to inform Belmont residents of their interests at stake. The notice was not reasonably calculated to advise parties that a vote would take place. This compounded the fact that a "vote" cannot be free and equal when the notice minimizes turnout and the failure to show up counts as a vote in favor of the LID formation. This vote was anything but free and equal. Accordingly, the invalidation of the LID is required.

V. CONCLUSION

There is little dispute that the CID did the bare minimum to process the add lands petitions and form the LID. Appellants maintain the CID intentionally chose procedures that minimized public awareness and participation so the CID could reach its pre-determined outcome. This case requires the Court to evaluate the CID's bare minimum performance in light of the numerous errors that were made and the interests at stake. The CID suggests the errors were harmless. However, these procedures were fraught with errors. Many of these errors went unnoticed until angry residents began requesting records through the Public Disclosure Act. Legitimate criticism exists at every phase of the both the add lands and

LID formation process. This is not government at its best. It is nowhere close. Due process and the Washington Constitution demands more. For these reasons, reversal of the trial court is required.

DATED this 28th day of February, 2008.

Respectfully submitted,

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